IN THE SUPREME COURT OF THE STATE OF NEVADA

JDD, LLC; TCS PARTNERS, LLC; JOHN SAUNDERS; and TREVOR SCHMIDT,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the HONORABLE JUDGE TIMOTHY C. WILLIAMS, District Court Judge,

Respondents,

and

ITEM 9 LABS CORP. f/k/a Airware Labs Corp., and Crown Dynamics Corp.; ITEM 9 PROPERTIES, LLC; STRIVE MANAGEMENT, LLC f/k/a Strive Life; VIRIDIS GROUP 19 CAPITAL, LLC; VIRIDIS GROUP HOLDINGS, LLC; SNOWELL HOLDINGS, LLC; ANDREW BOWDEN; DOUGLAS BOWDEN; BRYCE SKALLA; and CHASE HERSCHMAN,

Real Parties in Interest.

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ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

THE UNDERSIGNED counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Real party in interest Snowell Holdings, LLC is owned by private individuals and does not have a parent corporation. No publicly held entity has more than a 10% interest in Snowell Holdings, LLC.
2. The following law firms have appeared for the real parties in interest: Messner Reeves LLC and Bianchi & Brandt.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED this 1st day of November, 2021.

MESSNER REEVES LLP

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Real Party in Interest, SNOWELL HOLDINGS, LLC, by and through its counsel, MESSNER REEVES, LLP, hereby submits its Answer to Petition for Writ of Mandamus pursuant to the September 17, 2021, Court Order Directing Answer.

I.

STATEMENT OF FACTS

This case stems from alleged breaches of contract and trust related to two ostensible contracts between Petitioners and Defendants Donald Burton ("Burton") and Larry Lemons ("Lemons"). RAPP_0008–0011. Through these contracts, Petitioners purchased a small membership interest in Co-Defendant The Harvest Foundation, LLC ("Harvest"). RAPP_0008, 0010. Petitioners alleged Burton and Lemons improperly infringed on Petitioners' membership rights in Harvest by excluding Petitioners from Harvest's management and dealings with other named Defendants. RAPP_0011–0017.

Ultimately, Petitioners filed suit against twenty-two (22) Defendants, one of which was Snowell Holdings, LLC. RAPP_0002. Snowell is an Ohio limited liability company owned entirely by Defendant Lemons, an Ohio resident. RAPP_0074 at ¶¶4–5. Snowell does not conduct any business activities in Nevada, nor does it hold itself out as conducting business in Nevada. It has not sent any representatives to Nevada, does not pay taxes in Nevada, and does not maintain any bank accounts, post office boxes, or telephone listings in Nevada. RAPP_0074 at

¶¶6–9. Moreover, Snowell does not advertise or solicit business in Nevada. RAPP_0074 at ¶10. Snowell has no ownership interest in any Nevada company, nor does it own a portion of any of the entities named as Defendants in this lawsuit, including, without limitation to, Harvest. RAPP_0074 at ¶¶11–12. Lemons has an ownership interest in Harvest in his individual capacity, and conducted all business related to Harvest in his individual capacity. RAPP_0074 at ¶¶13–14.

These jurisdictional facts were initially presented to Petitioners' prior counsel Albright, Stoddard, Warnick & Albright ("ASWA") by phone on November 17, 2020. On November 20, 2020, ASWA informed Snowell that Petitioners agreed to dismiss Snowell for lack of personal jurisdiction. RAPP_0076. But on November 25, 2020, ASWA notified Snowell's counsel that Petitioners were no longer willing to dismiss Snowell despite their previous agreement.[1]

Because Petitioners refused to honor their promise to dismiss Snowell, Snowell was then forced to seek judicial assistance. Snowell moved to dismiss Petitioners' Complaint against it, arguing that Nevada courts lacked personal jurisdiction over Snowell. RAPP_0064–77. The District Court agreed and dismissed without prejudice the Complaint against Snowell on that ground. RAPP_0279–95.

[1] Petitioners made and then reneged on similar agreements with other defendants. RAPP_0414. In fact, Petitioners' dealings with the Item 9 Defendants took a particularly unpleasant turn, including threats, harassment, and intimidation. RAPP_0414.

The District Court also granted additional motions to dismiss filed by several individuals and entities, specifically the "Item 9 Defendants." RAPP_0078–0123.

Thereafter, Snowell promptly moved for attorney fees as a prevailing party under Nevada Revised Statute § 18.010. RAPP_0248–64; 407. The District Court agreed that Snowell was a prevailing party and granted Snowell's motion, awarding fees in the amount of $15,620.00. RAPP_0495, 883. The Court also awarded attorney fees to the Item 9 Defendants in the amount of $79,984.83. RAPP_0921. In response, Petitioners filed the instant Petition for Writ of Mandamus.

II.

BASIS FOR DENIAL OF PETITION FOR WRIT OF MANDAMUS

The instant Petition seeks a reversal of the District Court's exercise of its discretion to award attorney fees in this matter, insisting that Snowell is not a prevailing party. It boldly urges this Court to articulate an absolute rule that dismissal without prejudice always precludes a court from conferring "prevailing party" status, thereby preventing any such dismissed party from seeking attorney fees under NRS §18.010. Petition, p. 9. Snowell respectfully requests this Court to deny the instant Petition because 1) the Petition improperly requests extraordinary interlocutory relief when there is an adequate remedy at law; 2) the Petition fails to present a question of statewide importance needing clarification; and 3) judicial economy does not warrant consideration of the Petition.

A. Petitioners are Not Entitled to the Extraordinary Interlocutory Relief Requested Because an Adequate Remedy at Law Exists

A writ of mandamus is available "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Id.* And, generally, an appeal is an adequate legal remedy precluding writ relief. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Even if the appellate process would be more costly and time consuming than a mandamus proceeding, it is still an adequate remedy. See *County of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602 (1961).

Here the interlocutory relief Petitioners request should be denied as Petitioners have an adequate remedy at law available, namely appeal. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (reasoning that interlocutory orders entered prior to the final judgment may be heard on appeal).

B. Petitioners Do Not Raise an Important Issue of Law That Requires Clarification.

Petitioners claim that this Court should consider the instant Petition because whether a party dismissed without prejudice is a "prevailing party" is an important

issue of law requiring clarification. Petition, p. 11. However, Petitioners here manufacture an issue where none exists in an attempt to evade the adverse consequences arising from their inappropriate litigation tactics. Moreover, the solution they suggest comports with neither established Nevada law nor equitable policy principles.

Petitioners cite this Court's recent decision in *145 E. Harmon II Trust v. Residences at MGM Grand - Tower A Owners' Association* ("*Harmon II Trust*") and suggest that it somehow created a question of law that needs clarification. In *Harmon II Trust*, this Court ruled that dismissal with prejudice generally casts the dismissed party as "prevailing," thus clearing the way for that party to move for attorney fees. 1*45 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020). Petitioners submit that "[t]he line of federal authority relied upon by this Court in *145 East Harmon II Trust* also holds that parties who are dismissed without prejudice are not prevailing parties for purposes of attorney fee awards" and that "[t]hese authorities are in conformity with existing principles of Nevada law . . . ." Petition, p. 1. But Petitioners do not mention, and likely hope this Court will forget, that the *Harmon II Trust* Court declined to render an "absolute rule" stating that defendants who are dismissed with prejudice are prevailing parties. 136 Nev. at 120, 460 P.3d at 459. Rather, the Court

specifically noted that "there may be circumstances in which a party agrees to dismiss its case but the other party should not be considered a prevailing party." *Id*.

Indeed, as detailed below, rather than creating a legal ambiguity, *Harmon II Trust* clearly explained how District Courts should consider motions for attorney fees in cases of dismissal—that is, case by case, based on the underlying circumstances. And nothing in that case, or in the federal case law it cites, holds that if a defendant is dismissed without prejudice, it may never be designated a prevailing party.

Further, in an attempt to gin up urgency, Petitioners suggest that awarding attorney fees after a dismissal without prejudice is an issue frequently arising, thus warranting this Court's extraordinary intervention. Petition, p. 12. Rather than confirming that notion with a lengthy list of cases raising the same, Petitioners cite a single, inapposite, unpublished case, *Azzarello v. Humboldt River Ranch Ass'n*, 132 Nev. 941, 385 P.3d 50 (2016). Petitioners claim that *Azzarello* establishes that "a party who was dismissed without prejudice is not a prevailing party entitled to an attorney fee award" but because it is unpublished, it cannot be used as "mandatory precedent," merely "persuasive authority."[2] Petition, p. 13. Yet the flaw in that

[2] Interestingly, Petitioners base nearly their entire legal argument on interpretation of federal case law, also mere persuasive authority.

argument is not that *Azzarello* is merely persuasive but, rather, it is distinguishable from the instant matter.

In *Azzarello*, a party *voluntarily* dismissed the case without prejudice, meaning that no issues were decided in the case and that no "judicially sanctioned change" in the parties' legal relationship occurred. *Azzarello*, 132 Nev. 941, 385 P.3d 50 at *1. Here, Snowell's dismissal was involuntary. Petitioners reneged on a promise to dismiss Snowell, forcing Snowell to seek—and obtain—the very "judicially sanctioned change in the legal relationship" that is required to attain prevailing party status.

Notwithstanding Petitioners' resort to inapposite legal authority, no legal uncertainty requiring clarification arises in the wake of *Harmon II Trust*. Instead, the opposite is true. *Harmon II Trust* clearly establishes that a District Court must engage in circumstance-based analysis when considering whether a party has prevailed for purposes of awarding attorney fees under NRS §18.010. That is just what Judge Williams did in this case. Thus, no important state-wide issue of law requiring clarification is at play here.[3]

[3] Petitioners suggest in a footnote that to resolve the issue at bar would also clarify the question of when dismissals for lack of jurisdiction may be with prejudice. Petition, p. 13 n. 6. Petitioners never raised that issue below, and so this Court need not consider it for the first time in a writ petition. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). In addition, Petitioners contradict this very notion by

Finally, Petitioners' requested solution is detrimental from a policy standpoint. This court has already established its reluctance to draw a bright-line rule that any party who is dismissed with prejudice is, by definition, a prevailing party. Indeed, it could not because circumstances matter in deciding such issues. It stands to reason that this Court would be even less likely to articulate an absolute rule regarding awards of attorney fees when dismissal is without prejudice, prone as such matters are to the vagaries of circumstance. Such a rule would preclude anyone dismissed without prejudice from seeking attorney fees, regardless of the reason for the dismissal—thereby disenfranchising entire groups of litigants who might be able to seek attorney fees but were prevented from doing so by an ill-advised absolute rule. This Court must surely acknowledge that to create such a rule would result in harsh consequential law that would confuse rather than clarify. Moreover, the rule for which Petitioners advocate strips District Courts of the very discretion that is *written into the statute*.

In addition, such a rule encourages the kind of abusive litigation behavior Petitioners employed here: namely, taking a kitchen-sink approach to naming potential defendants and hoping discovery will later reveal causes of action. Here, Petitioners had no factual basis to raise any claim against Snowell. They knew only

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declaring that "[w]hile this Court has not explicitly addressed this issue, dismissals for lack of jurisdiction are always without prejudice . . ." thereby undermining their own argument. Petition, p. 21 (emphasis added).

that Snowell was owned by Lemons but had deduced no facts that Snowell was in any way involved in this matter. In fact, Petitioners admit that their rationale for suing Snowell was purely speculative. They blustered that if only they were allowed to perform discovery, they could unearth material to use against Snowell, given that the only evidence that Snowell was *not* involved in the instant matter arose from Lemons' affidavit. RAPP_0302–03. They then went on to impugn Lemons' honesty and imply that the information in the affidavit must be false. RAPP__0302–0303. Not one time have Petitioners, *nor could they have,* offered a single piece of evidence or even allegations supporting Snowell's involvement in the underlying matter, yet they named Snowell as a defendant anyway. That kind of abusive behavior is a clear violation of NRCP 11, as Judge Williams noted, which supports the discretion of the District Court in awarding attorney fees under NRS § 18.010.

In sum, Petitioners advocate for an absolute rule stating that defendants dismissed without prejudice, regardless of the reason for dismissal, may never attain prevailing-party status. However, that proposed rule is unsound from the standpoint of both law and policy and should, therefore, not be adopted.

C. "Judicial Economy" Does Not Warrant Consideration of the Instant Petition.

Petitioners also encourage this Court to consider their Petition because to do so would supposedly further judicial economy. They claim that other parties dismissed from this case have not but may yet move for attorney fees, and so this

issue is ripe for re-litigation. Petition, p. 14. That argument rests on purely speculative foundation. It is not clear whether the other dismissed parties will ever seek attorney fees. Unless they do, this is a non-issue.

Petitioners also raise the specter of multitudinous future litigation if this Court fails to rule on this issue in Petitioners' favor. The relief they seek, if granted, would preclude the vast majority of dismissed litigants from seeking attorney fees simply because they were dismissed without prejudice, without regard to the circumstances underlying that dismissal. Such a blanket ruling would also remove from the District Court its well-established discretion to award attorney fees and prevent it from engaging in circumstance-specific analysis. NRS §18.010; *see generally Harmon II Trust,* 136 Nev. 115, 460 P.3d 455 (2020). That result would treat this relative non-issue with a legal hacksaw when instead, a scalpel is needed.

The virtue of "judicial economy" is not intended to prevent parties from seeking legitimate relief. This is especially true when plaintiffs, as here, take an indiscriminate, machine-gun approach to naming defendants, hoping that if they fire enough bullets, or "nukes" in this case, some money will come leaking out of one of the holes they create. RAPP_0416. Thus, the principle of judicial economy does not justify considering the instant Petition.

Therefore, for these reasons, and as detailed below, this Court must deny the instant Petition.

III.

POINTS AND AUTHORITIES

Petitioners assert that the District Court abused its discretion in awarding attorney fees to Snowell because the Complaint against Snowell was dismissed without prejudice, and thus, Snowell was not a prevailing party. Petition, p. 15. In support, Petitioners analyze this Court's recent decision in *Harmon II Trust* and insist that it and the federal case law it cites establish that only dismissal with prejudice confers prevailing-party status on the dismissed party. Petition, p. 16–17. Petitioners note that some of the federal cases the *Harmon II Trust* Court cited "distinguish between dismissals *with* prejudice and dismissals *without* prejudice." Petition, p. 17. Petitioners then engage in a convoluted analysis of federal case law, which they claim establishes that dismissal without prejudice, regardless of the reason for the dismissal, does not confer prevailing-party status. Petition, pp. 16–20. All that analysis in the end boils down to two Ninth Circuit cases, *Oscar v. Alaska Department of Education and Early Development*, 541 F.3d 978 (9th Cir. 2008), and *Cadkin v. Loose*, 569 F.3d 1142, 1148-49 (9th Cir. 2009). Petitioners claim that *Oscar* establishes the principle that

> an involuntary dismissal without prejudice pursuant to a motion to dismiss did not confer prevailing party status because (1) "dismissal without prejudice is not a decision on the merits" sufficient to support a judgment, and (2) involuntary "dismissal without prejudice does not alter the

> legal relationship of the parties because the defendant remains subject to the risk of re-filing."

Petition, p. 19.[4] Petitioners argue that this reasoning precludes designating that dismissed party as "prevailing" for purposes of NRS § 18.010. Petition, p. 19.

Petitioners are wrong on several fronts. First, *Harmon II Trust* does not establish a bright-line rule that all dismissals with prejudice confer prevailing-party status. Next, Petitioners ignore United States Supreme Court authority that postdates both *Oscar* and *Cadkin* and completely undoes Petitioners' argument. *CRST Van Expedited, Inc*. v. E.E.O.C., 578 U.S. 419 (2016). Petitioners also disregard other recent federal circuit authority that applies *CRST* and displays just how bankrupt Petitioners' argument and analysis are.

Based on this outdated and inapposite reasoning, Petitioners request this Court to do in the context of dismissal without prejudice what it pointedly refused to do as to dismissal with prejudice: create an absolute rule. The *Harmon II Trust* Court engaged in a nuanced analysis of "prevailing party" status as conferred in the context of dismissal with prejudice, in which it mentioned *in passing* that some federal circuit courts had stated (albeit in dicta) that dismissal without prejudice does not decide a case on the merits. *Id*. at 119–120, 460 P.3d at 458–59. This Court then

[4] *Cadkin* discusses voluntary dismissal without prejudice, and so is not relevant to the instant Petition as it relates to Snowell. Thus, Snowell will not engage in analysis of that case.

went on to explain that circumstances exist wherein even parties dismissed with prejudice may not be prevailing parties for purposes of NRS § 18.010. *Id*. at 120, 460 P.3d at 459. Petitioners now urge this Court to extrapolate from its limited, circumstance-specific decision to render a broad-ranging fiat that no party dismissed without prejudice may *ever* be considered a prevailing party for purposes of seeking attorney fees.

Ultimately, Nevada law does not hold, and federal law does not support, that parties dismissed without prejudice cannot be considered "prevailing" under NRS § 18.010. Therefore, this Court must deny the instant Petition.

A. Standard of Review

When, as here, an attorney fees matter implicates questions of law, this Court employs de novo review. *Harmon II Trust*, 136 Nev. at 118, 460 P.3d at 457 (citing *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057,1063 (2006)). "The issue here implicates a question of law because it involves statutory interpretation—the meaning of 'prevailing party,' as used in NRS § 18.010(2) . . . ." *Id.*

B. The District Court Did Not Abuse its Discretion in Granting Snowell Attorney Fees

Nevada courts may award attorney fees to a prevailing party "when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to

harass the prevailing party." NRS § 18.010. But before deciding whether to award attorney fees, a court must determine whether the party seeking fees has prevailed in the litigation. *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 789 (1989). "A party prevails under NRS § 18.010 if it succeeds on any significant issue in litigation . . . ." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) (internal quotations and alterations omitted). The "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers Assn.*, 489 U.S. at 792–793. This change must be marked by "judicial imprimatur." *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016).

1. There Need Not Be a Decision on the Merits to Confer Prevailing-Party Status.

Petitioners argue that for a party to prevail for purposes of an award of fees under NRS § 18.010, there must have been a judgment on the merits. Although thirteen-year-old Ninth Circuit authority may hold thus, specifically *Oscar v. Alaska Department of Education and Early Development*, 541 F.3d 978 (9th Cir. 2008), Petitioners ignore that the United States Supreme Court has recently ruled otherwise.

The Supreme Court has recently held that to be considered a prevailing party under a fee-shifting statute, there need *not* be a judgment on the merits. In *CRST Van Expedited, Inc. v. E.E.O.C.*, the Supreme Court decided the issue of whether a

dismissed defendant was entitled to attorney fees under a fee-shifting statute similar to NRS § 18.010. Among other reasons, a District Court dismissed sexual harassment claims by the EEOC against a trucking company "for a lack of investigation and conciliation," which the Court of Appeals upheld as proper. *CRST*, 578 U.S. at 427. In affirming nearly all the claims the EEOC appealed, the Court of Appeals noted that the EEOC "did not reasonably investigate the class allegations of sexual harassment during a reasonable investigation of the charge, but rather used discovery in the resulting lawsuit as a fishing expedition to uncover more violations." *Id*. (internal citations omitted).

On remand, the District Court awarded CRST attorney fees, holding that dismissal of 67 claims was a ruling on the merits and that the EEOC's failure to investigate those 67 claims was unreasonable, which the EEOC appealed. *Id*. at 429. Bound by its own precedents, the Court of Appeals subsequently overturned the District Court's grant of attorney fees, ruling that dismissal of the claims of failure to investigate or conciliate was not a ruling on the merits. *Id*. The Court of Appeals further reasoned that "[p]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." *Id*. at 429–30.

The United States Supreme Court disagreed and held that a defendant need not obtain a favorable judgment on the merits to be a prevailing party. *Id.* at 431.

The Court explained that since plaintiffs and defendants seek different outcomes in court, the prevailing party determination is different for each:

> Common sense undermines the notion that a defendant cannot "prevail" unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship between the parties. *A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor.* The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations. *The defendant has, however, fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision.* The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason.

Id. (emphasis added). The Court further explained that "one purpose of [a] fee-shifting provision is to deter the bringing of lawsuits without foundation" and observed that "[i]t would make little sense if [the] policy of sparing defendants from the costs of frivolous litigation depended on the distinction between merits-based and non-merits-based frivolity." *Id.* at 432 (internal quotations omitted). The Court ultimately stated that, "[i]mposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that . . . policy by blocking a whole category of defendants for whom Congress wished to make fee awards available." *Id.*

The Court went on to enumerate non-merits-based reasons that a plaintiff's claim might be frivolous, unreasonable, or groundless, such as sovereign immunity

or mootness and yet would still have required the defendants to expend money and resources to contest the claim. *Id*. at 434. The Court noted that it could not have been the intent to bar such defendants from awards of attorney fees "on the basis that, although the litigation was resolved in their favor, they were nonetheless not prevailing parties. Neither the text of the fee-shifting statute nor the policy which underpins it counsels in favor of adopting the Court of Appeals' on-the-merits requirement." *Id*. Finally, the Court declined to hold that a defendant must "obtain a preclusive judgment" to prevail. *Id.*

Earlier this year, the Eleventh Circuit cited *CRST* and used that case's reasoning to award attorney fees to a defendant. *Beach Blitz Co. v. City of Miami Beach, Fla.*, 13 F.4th 1289 (11th Cir. 2021). A municipal defendant moved successfully to dismiss a complaint on grounds that it was "groundless, frivolous, unreasonable, or without foundation" and failed to state federal claims under §1983. *Id*. at 1295. The complaint was dismissed without prejudice and without opportunity to amend, and the court entered judgment and closed the case. *Id*. at 1296.

On appeal, the Eleventh Circuit cited *CRST* and explained that "[plaintiff's] attempt to alter its legal relationship with the City was 'rebuffed,' . . . and that the District Court's dismissal placed the requisite judicial imprimatur on the parties' legal relationship." *Id*. at 1298. The Court also noted that, while some courts after *CRST* have taken differing positions, a dismissal for lack of personal jurisdiction had

conferred prevailing party status and that "a previous decision holding that a defendant who had obtained a dismissal on *forum non conveniens* grounds was not a prevailing party because the plaintiff could pursue his claims against the defendant in another forum might or might not retain vitality . . . in the wake of *CRST*." *Id*. at 1301 (internal citations omitted). Finally, the Court ruled that "the frivolity of a claim must be determined on a case-by-case basis." *Id*. 1302.

Here, NRS § 18.010, like Title VII (the statute at issue in *CRST*), is a fee-shifting statute. Also, as in *CRST*, the District Court barred Petitioners from seeking relief against a defendant, Snowell, for a non-merits-based reason: here, because it did not have personal jurisdiction over Snowell. Likewise, as in *Beach Blitz*, there is no doubt that Petitioners' attempt to alter its legal relationship with Snowell was rebuffed and bears the requisite judicial imprimatur given that the District Court dismissed their complaints on personal jurisdiction grounds. And the *CRST* Court noted with disfavor the inappropriate practice of using discovery as a "fishing expedition" to discover more claims. Petitioners admit that just such a tactic is their only possible avenue to a claim against Snowell. RAPP_0302. That kind of impermissible litigation behavior is subject to Rule 11 sanctions. NRCP 11(b)(3).

In addition, the case law Petitioners employ is distinguishable. As noted, *Oscar* predates *CRST*, and thus the *CRST* Court subsequently invalidated *Oscar's* statement that a judgment on the merits is required to be confer prevailing party

status. 541 F.3d 978, 981 (9th Cir. 2008). Moreover, *Cadkin* pertains to voluntary dismissal and thus is wholly irrelevant to the analysis in this case. In addition, *Texas Teacher's Association* discusses whether *Plaintiffs* prevailed in some way and does not discuss whether dismissed defendants had some success. 489 U.S. at 792.

In their haste to convince this Court that Snowell is not a prevailing party and is thus ineligible for attorney fees, Petitioners have cited inapposite federal case law and, even more disturbingly, neglected to cite to a recent United States Supreme Court case that directly contradicts their argument. This Court must not reward Petitioners for this kind of slipshod (at best) behavior, which is likely another example of the lengths they will go to avoid the consequences of their original error of pleading: naming a party for which they were not able to establish a prima facie case for personal jurisdiction. In the end, neither Nevada law nor federal case authority supports their arguments, and so, the instant Petition must be denied.

2. Dismissal without Prejudice Altered the Legal Relationship of the Parties.

Petitioners briefly mention, without any serious analysis, that dismissal in this case did not alter the legal relationship because Snowell "remains subject to the risk of re-filing." Petition, p. 19 (citing *Oscar*, 541 F.3d at 981–82). However, this is not a plausible argument. As explained above, under the reasoning set forth in *CRST*, Snowell fulfilled its objective with regard to the "alteration" piece when the

Petitioners' challenge was rebuffed upon dismissal, "irrespective of the precise reason for the court's decision." 578 U.S. at 431. Even if that were not true, Petitioners may also not rest on the notion that the legal relationship did not undergo alteration because they could refile against Snowell in Nevada.

Snowell is an Ohio LLC with no contacts of any kind with Nevada, as explained amply above, which precludes re-filing in state court. Petitioners likewise may not file in federal court because the instant case implicates no federal statutes. *See* 28 U.S.C. § 1331; *Cath. Diocese, Green Bay v. John Doe 119*, 131 Nev. 246, 249, 349 P.3d 518, 520 (2015); *Trump v. Eighth Jud. Dist. Ct*, 109 Nev. 687, 699, 857 P.2d 740, 748 (1993). And even if the Nevada federal court exercised diversity subject matter jurisdiction, it would still not have personal jurisdiction over Snowell as an Ohio entity. *See* 28 U.S.C. § 1332. Nor could Petitioners file against Snowell in Ohio because none of the events occurred in Ohio. "The issue of final resolution should not depend on the plaintiff's possible future conduct. Moreover, prevailing party attorney fees should be awarded based on the contract language, the statutory language, and the fact of dismissal of the case, not on speculation." *Profit Concepts Mgmt., Inc. v. Griffith*, 162 Cal. App. 4th 950, 956, 76 Cal. Rptr. 3d 396, 400 (2008) (ruling that dismissal for lack of personal jurisdiction does not foreclose prevailing party status).

Consequently, even though the dismissal was without prejudice, Petitioners are effectively precluded from re-filing their claims against Snowell. But even if that were not true, under *CRST*, and as explained by the *Beach Blitz* Court, no merits-based judgment is required to determine that Snowell is a prevailing party. Therefore, because Snowell succeeded on a significant issue in litigation—namely dismissal for lack of personal jurisdiction—and thereby succeeded in rebuffing Petitioners' attempt to alter the legal relationship, Snowell is a prevailing party, rendering the District Court's grant of attorney fees proper in this case.

IV.

CONCLUSION

Petitioners have not demonstrated that this matter merits extraordinary review and relief from this Court. Therefore, based on the records and arguments herein presented, Real Party in Interest Snowell respectfully requests this Court deny the instant Petition for Writ of Mandamus.

DATED this 1st day of November, 2021.

MESSNER REEVES LLP

/s/ Candace Herling

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Answer to Petition for Writ of Mandamus has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this Answer to Petition for Writ of Mandamus complies with the page-or-type volume limitations of NRAP 32(a)(7) because, excluding the parts of the Answer to Petition for Writ of Mandamus exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6282 words.

3. I hereby certify that I have read this Answer to Petition for Writ of Mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Answer to Petition for Writ of Mandamus complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Answer to Petition for Writ of Mandamus regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

that the accompanying Answer to Petition for Writ of Mandamus is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of November, 2021.

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/s/ Candace Herling

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CERTIFICATE OF SERVICE

I certify that on this 1st day of November, 2021, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I submitted the foregoing, "Answer to Petition for Writ of Mandamus" for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that a copy of this document will be served by mail, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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